RHB BANK BHD v. DUGWOO (M) SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL WAHAB MOHAMED J
[SUITS NO: TA-22NCVC-20-04-2016 & TA-22NCVC-30-07-2017]
2 MARCH 2020

BANKING: *Banker and customer – Loan agreement – Facilities agreement – Whether certificate of indebtedness conclusive proof of debt – Offer to convert overdraft facility into term loan – Whether conditional acceptance by customer amounted to counter-offer – Whether acceptance implied by conduct – Whether doctrine of legitimate expectation applicable – Whether rule in Turquand's case applied – Whether customer liable for amount owed*

The plaintiff issued three letters of offer to the defendant company, each dated 18 August 2011, 15 January 2013 and 1 October 2015. The plaintiff had also issued two letters of notification to the defendant company dated 5 October 2011 and 20 December 2011. Both parties also entered into a facilities agreement dated 16 November 2011. The second and third defendant, the directors of the defendant company, signed the personal guarantee, *inter alia*, agreeing to be the principle debtors for the total amount due and owing by the defendant company to the plaintiff and, as guarantors, they were also jointly and severally liable for the total amount due and owing by the defendant company to the plaintiff. *Via* an email dated 22 December 2015, the plaintiff offered to restructure the defendants' overdraft facility to be converted into five years term loan, to which the defendants agreed conditionally *via* an email dated 23 December 2015. However, the plaintiff did not proceed with the proposed restructuring but had on 22 March 2016 proceeded to uplift the fixed deposit totaling to RM751,065.92 to paydown the outstanding debt due and owing by the defendant company upon the defendant company's failure, negligence and/or omission to meet the repayment terms. In consideration for the loan facilities, the defendant company had further created a charge in favour of the plaintiff over properties owned by the defendant company. The plaintiff thus claimed for the amount of RM239,806.71 as at 31 August 2019 for the balance outstanding under the overdraft facility and the sum of RM594,057.03 as at 31 August 2019 for the balance outstanding under the term loan granted pursuant to the facilities agreement dated 16 November 2011. The defendants counterclaimed for aggravated damages and general damages against the plaintiff premised on the unlawful and illegal termination of the loan agreement between the plaintiff and the first defendant. The key issues for determination by the court were: (i) whether the defendant company had failed, refused and/or was negligent in fulfilling its obligation in the

repayment of the loan sum to the plaintiff; (ii) whether there existed an agreement to restructure the overdraft facility to be converted into five years term loan; (iii) whether the second and third defendants were liable as guarantors for the repayment of the amount due and owing by the defendant company; and (iv) whether the termination of the loan agreement was premature and defective.

Held (dismissing plaintiff's claim and defendants' counterclaim):

(1) Clause 12.12 of the facilities agreement clearly stated that the certificate of indebtedness shall operate as binding and conclusive evidence of indebtedness. The onus was on the defendants who challenged the action to show a manifest error. There was nothing to indicate or suggest any manifest error on the fact of the certificate of indebtedness nor was any fraud shown. Neither could the defendants proffer any justification that could disprove the conclusive nature of the same. A bare assertion of manifest error and mere denial of the amount stated were not sufficient for the defendants to challenge the amount in the certificate of indebtedness. (paras 25-27)

(2) A valid acceptance is one that is absolute and unqualified as prescribed under s. 7 of the Contracts Act 1950, as such, a conditional or qualified acceptance of an offer cannot bring about a legally binding contract. The defendants, in the email dated 23 December 2015, were willing to accept the plaintiff's offer on condition that payment should commence in April 2016, which tantamount to a counter-offer. Although no acceptance and/or rejection was communicated by the plaintiff to the offer, acceptance could be inferred from the conduct of the parties. It was absurd for the plaintiff to refuse the restructuring of the overdraft facility merely because the defendants had replied with a counter-offer. The plaintiff had proceeded to uplift the fixed deposit totaling to RM751,065.92 to settle part of the overdraft facility in accordance with their proposal in the email dated 22 December 2015. There was an implied acceptance of the counter-offer on the part of the plaintiff. (paras 33-35, 37 & 38)

(3) In order for the doctrine of legitimate expectation to give rise to a substantive right, an ambiguous representation must have induced the said legitimate expectation. The plaintiff had clearly made a commitment to restructure the overdraft facility notwithstanding the defendants' reply to the plaintiff, thereby enabling the defendants to invoke the doctrine of legitimate expectation. The defendants expected the plaintiff to keep their promises for the restructuring of the overdraft facility. The duty thus fell on the plaintiff to fulfil what had been promised to the defendants. (paras 40 & 41)

(4) PW2 had the authority to deal with the plaintiff in matters relating to the restructuring of the overdraft facility and had admitted, during trial, that the matter was never brought to the attention of the approving body. PW2's failure could not be attributed to the defendants and there was no obligation imposed on the defendants to inquire into PW2's work. It was reasonable for the defendants to expect that PW2 had acted in compliance with the internal procedures of the plaintiff in ensuring that the restructuring of the first defendant's overdraft facility obtained the requisite approval. Once the rule in *Turquand's* case was held to apply, the presumption of regularity of the internal affairs of the company became irrebuttable. The plaintiff was liable towards the defendants to restructure the first defendant's overdraft facility to be converted to a five years term loan as proposed in the email dated 22 December 2015. (paras 43 & 44)

(5) The termination of the loan agreement by the plaintiff was premature and invalid. In order for the defendants to be able to claim for damages, the defendants must prove the damage and it was not enough to merely write down the particulars and rely on the same. The list of requests for proposals tendered by the defendants was merely requests for quotations and did not amount to sufficient proof of damages against the plaintiff. Therefore, the defendants had failed to prove its claim for damages against the plaintiff. (paras 51 & 53)

Case(s) referred to:

Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan Wan Majid & Anor (Interveners) [1996] 3 CLJ 393 HC ***(refd)***

Affin Bank Bhd v. Mohd Kasim Ibrahim [2013] 1 CLJ 465 FC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 CLJ 538 CA ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990) 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Royal British Bank v. Turquand (1856) 119 ER 886 ***(refd)***

Seni Jaya Sdn Bhd & Anor v. Dato' Hj Ahmad Tarmizi Hj Puteh & Anor [2019] 1 CLJ 713 FC ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Tengku Azman Tengku Adnan & Anor v. Hong Leong Bank Bhd [2014] 1 LNS 478 CA ***(refd)***

The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor [1998] 2 CLJ 486 FC ***(refd)***

Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor [2012] 5 CLJ 229 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 7

Other source(s) referred to:
McGregor On Damages, Sweet & Maxwell, 18th edn, 2009, para 8-001

For the plaintiff - Edwin Seibel, Syazwan Fakhirruddin & Nur Liyana Izzati Abd Aziz; M/s Gibb & Co
For the defendants - Shaik Mohamed Imran Mohd Ismet & Fairuz Zafirah Zainudin Merican; M/s Farah A. Zabir & Partners

Reported by S Barathi

JUDGMENT

Abdul Wahab Mohamed J:

Introduction

[1] This an action by the plaintiff against the defendants, claiming for the sum of RM239,806.71 as at 31 August 2019, allegedly for the balance outstanding under an overdraft facility and the sum of RM594,057.03 as at 31 August 2019 allegedly for the balance outstanding under the term loan granted by the plaintiff to the first defendant pursuant to the facility agreement executed between the plaintiff and the first defendant dated 16 November 2011.

[2] The defendants counterclaimed against the plaintiff for the aggravated damages and general damages suffered by the defendants due to the action taken by the plaintiff on the basis that this action was commenced prematurely and unlawfully, therefore, there was a breach of the loan agreement by the plaintiff.

Background Facts

[3] There were three letters of offer issued by the plaintiff to the defendant company each dated 18 August 2011, 15 January 2013 and 1 October 2015. The plaintiff had also issued two letters of notification to the defendant company dated 5 October 2011 and 20 December 2011.

[4] Both parties in this suit had also entered into a facilities agreement dated 16 November 2011, the personal guarantee dated 16 November 2011 was signed by Azmi bin Abdullah, the second defendant and Noaini @ Noraini binti Ngah, the third defendant who are also the directors of the defendant company, the personal guarantee dated 20 March 2013 was also signed by the second and third defendants in respect of the loan facilities granted to the defendant company.

[5] The salient terms of the personal guarantees are:

(i) as the guarantors for the loan facilities granted to the defendant company, both the second and third defendants had agreed to be the principal debtors for the total amount due and owing by the defendant company to the plaintiff; and

(ii) in that regard, as guarantors, both the second and third defendants are also jointly and severally liable for the total amount due and owing by the defendant company to the plaintiff.

[6] *Via* an email dated 22 December 2015, there was an offer from the plaintiff to restructure the defendants' overdraft facility, to be converted into five years term loan. The second defendant had agreed conditionally to the said proposal *via* his email dated 23 December 2015.

[7] The plaintiff did not proceed with the proposed restructuring but had on 22 March 2016 proceeded to uplift the fixed deposit totaling to RM751,065.92 to paydown the outstanding debt due and owing by the defendant company upon the defendant company's failure, negligence and/or omission to meet the repayment terms.

[8] In consideration for the loan facilities, the defendant company had further created a charge in favour of the plaintiff over properties owned by the defendant company.

[9] As a result of the defendant company's failure, negligence and/or omission to meet the repayment terms, the plaintiff had after the issuance of the necessary and relevant notices under the National Land Code obtained an order for sale on 13 February 2017 at the Pejabat Tanah Dungun.

Plaintiff's Submission

[10] The plaintiff submitted that the modes of communication *via* WhatsApp and email are to ensure that the exchange of information between the bank and the borrower was done swiftly and efficiently, such as in the event that the borrower defaulted in their payment. The plaintiff contended that in the common course of commerce, only an official letter would be considered an official act by the bank, in the absence of such official letter, it was thus the plaintiff's contention that there was no concluded agreement in respect of the restructuring of the defendants' overdraft facility.

[11] The plaintiff submitted that based on the plaintiff's email dated 22 December 2015, it is clear that the offer made by the plaintiff is subject to a condition whereby plaintiff is only agreeable to the restructuring of the outstanding of the overdraft facility amounting to RM60,804.80 is covered by the defendants.

[12] The plaintiff further submitted that there was no agreement concluded in respect of the restructuring of the defendants' overdraft facility as there was no further reply by the plaintiff and/or its officers communicating their acceptance to the condition proposed by the defendants in the defendants' email dated 23 December 2015.

[13] The plaintiff also submitted that the defendants' allegation on lack of communication in respect of the reduction of overdraft facility by the plaintiff to the defendants was baseless and flawed on the ground that it was within the plaintiff's absolute discretion to do so as provided for under cl. 12 of the letter of offer dated 15 January 2013.

The Defendants' Submission

[14] The first defendant, in their defence, had contended that there were numerous communications by Suzana binti Baharin (PW2), plaintiff's relationship manager in charge of the first defendant's loan account, who had corresponded with the first defendant, *vide* emails and WhatsApp messages with the second defendant on the restructuring of the first defendant's overdraft facility. It was thus the defendants' primary contention that the plaintiff is bound by the said communications that PW2 have had with the first defendant.

[15] The defendants submitted that the email and WhatsApp correspondences between PW2 and the second defendant had created a legitimate expectation on the first defendant that there is a binding contract created by the plaintiff, through its agent, to restructure the overdraft facility and thus restructuring the entire facilities agreement as well.

[16] Subsequent to that, the defendants submitted that any actions taken by the plaintiff in terminating the facilities agreement is considered premature and unlawful, thus bearing a breach by the plaintiff itself of the said facilities agreement. Hence forth, all claims initiated by the plaintiff as against the first defendant should not prevail and dismissed due to the said restructuring plan offered by the plaintiff.

[17] The defendants further submitted that the general rule in *Turquand* applies to the facts in the instant case and therefore PW2's promise to restructure the first defendant's overdraft facilities should contractually bind the plaintiff itself and therefore any subsequent actions taken by the plaintiff including the termination of the entire facilities agreement and the issuance of the notice of demand is therefore premature and thus this action is invalid.

[18] It is also the defendants' submission that both the email and the WhatsApp correspondences between PW2 on behalf of the plaintiff and the second defendant on behalf of the first defendant constitute an undertaking by the plaintiff to conduct the restructuring of first defendant's overdraft facility which has fallen into excess.

[19] It was fervently submitted by the defendants that there has been an unlawful termination of the first defendant's facilities agreement by the plaintiff. The defendants contended that in the absence of any violation of the term of the facilities agreement by the first defendant, the plaintiff should not have terminated the facilities agreement thus making the notice of termination premature and therefore defective.

[20] It was also submitted that the defendants are claiming for aggravated damages and general damages against the plaintiff for their action in terminating the facilities agreement.

Issues To Be Determined

[21] In my view, the key issues arose for my determination are as follows:

(i) Whether the defendant company had failed, refused and/or was negligent in fulfilling its obligation in the repayment of the loan sum to the plaintiff;

(ii) whether there exists an agreement to restructure the overdraft facility to be converted to a five years term loan as alleged by the defendants;

(iii) whether the second and third defendants are liable as guarantors for the repayment of the amount due and owing by the defendant company; and

(iv) whether the termination of the loan agreement was premature and defective.

Findings Of This Court

[22] The plaintiff's pleaded claim is for the non-payment of the facilities agreement dated 16 November 2011. It was not disputed between parties that the defendants are under an obligation to pay for the sum due and owing under the overdraft facility and the term loan as agreed between parties.

[23] The monies due and owing by the defendants to the plaintiff is for the total sum of RM239,806.71 as at 31 August 2019, for the balance outstanding under an overdraft facility and the sum of RM594,057.03 as at 31 August 2019 for the balance outstanding under the term loan granted by the plaintiff to the first defendant pursuant to the facilities agreement executed between the plaintiff and the first defendant dated 16 November 2011 as evident from the certificate of indebtedness adduced before this court.

[24] The conclusiveness of such evidence has been well established in the oft-quoted case of *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685, where the Federal Court in reversing the Court of Appeal's decision requiring the plaintiff to tender further proof of the defendant's indebtedness had held as follows:

> This observation appeared to have escaped the attention of the Court of Appeal in the present case. In the result, the Court of Appeal took the position that the conclusiveness of the certificate of indebtedness exh. P3 was binding only upon the parties and that the court would still have to determine whether sufficient evidence had been adduced to prove quantum and the correctness of the amount claimed. With respect, such a proposition goes against the entrenched principles enunciated by Raja

Azlan Shah CJ (Malaya) (as His Highness then was) in *Citibank N.A. v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282 when he said *inter alia*:

> We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the R.S.C. Order 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents ... It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

[25] Having carefully scrutinised the facilities agreement, cl. 12.12 of the facilities agreement clearly stated that the certificate of indebtedness shall operate as binding and conclusive evidence of indebtedness, which read as follows:

> ... a certificate or a statement of account in writing showing the indebtedness of the Borrower, or any security party, which is duly certified by an authorised officer of the Bank shall be binding and conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of indebtedness in a court of law.

[26] Based on the above authority and in view of the above clause, the onus would thus be on the defendants who challenged the action to show a manifest error. I agree with the plaintiff's counsel that a bare assertion of manifest error and mere denial of the amount stated are not sufficient for the defendants to challenge the amount in the certificate of indebtedness. The said principle had been highlighted in the Court of Appeal case of *Tengku Azman Tengku Adnan & Anor v. Hong Leong Bank Bhd* [2014] 1 LNS 478; [2015] 2 MLJ 139 where it was held as follows:

> Apart from complaining that the sum claimed was wrongly calculated by the respondent and was excessive, the appellants did not adduce any evidence to challenge the "method" of calculation nor the quantum of the outstanding sum. Accordingly, and in light of the decision in the case of *Cempaka Finance Bhd v. Ho Lai Ying (trading as KH Trading) & Anor* [2006] 3 CLJ 544; [2006] 3 MLJ 685 (FC), a certificate of indebtedness is deemed to be final and conclusive ...

[27] There is nothing to indicate or suggest any manifest error on the face of the certificate of indebtedness nor is any fraud shown. In the circumstances and given the authorities cited, I am of the firm view that the said certificate of indebtedness operates as conclusive evidence of the indebtedness of the defendants. Neither could the defendants proffer any justifications that could disprove the conclusive nature of the same. In fact, no credible challenge has been made by the defendants against the said certificate of indebtedness.

[28] Notwithstanding what has been stated above in respect of the conclusiveness of the certificate of indebtedness, the important issue to be determined by this court was whether there exists an agreement to restructure the overdraft facility to be converted to a five years term loan as alleged by the defendants.

Whether There Exists An Agreement To Restructure The Overdraft Facility

[29] The defendants had pleaded that in reliance to the email correspondences between one of the officers of the plaintiff, Suzana binti Baharin (PW2) and the second defendant that there existed an agreement between parties on the restructuring of the first defendant's overdraft facility to be converted to a five years term loan.

[30] Evidently from the email dated 22 December 2015, there was an offer from the plaintiff to restructure the defendants' overdraft facility to be converted into five years term loan on the condition that excess of overdraft facility amounting to RM60,804.80 is covered by the defendants.

[31] The second defendant had replied to the said email *via* his email dated 23 December 2015 in the following terms:

> We agree to the restructuring for the term loan. And we also agree on the recommendation of the loan recovery but with one condition that we are going to start the payment early April 2016.

[32] Now the question arises for this court's determination was whether there was a concluded contract between parties based on the email correspondences between PW2 and second defendant.

[33] It is a fundamental principle of the law of contract that a valid acceptance is one that is absolute and unqualified as prescribed under s. 7 of the Contracts Act 1950, as such, a conditional or qualified acceptance of an offer cannot bring about a legally binding contract. This principle is endorsed by the Federal Court in the case of *Seni Jaya Sdn Bhd & Anor v. Dato' Hj Ahmad Tarmizi Hj Puteh & Anor* [2019] 1 CLJ 713 where it was held as follows:

> [21] What s. 7(a) says is simply this. For any concluded agreement to come into existence, there must be a clear and definite offer by the proposer and an "absolute and unqualified" acceptance of the same by the offeree. The phrase "absolute and unqualified" is critical in that any

> acceptance coupled with any condition can never be an "absolute and unqualified" acceptance. It must be absolute in that all terms set out in the offer must be accepted. It must be unqualified in that acceptance attached with condition is a qualified acceptance. Once such conditional acceptance is on the negotiating table so to speak, the parties are simply back to the negotiating mode as there is now a counter-offer by the offeree which in effect rejects the proposal. Withdrawal of the conditional acceptance *per se* would not revive the original offer. Only an absolute and unqualified acceptance of the counter offer by the proposer will there be a concluded contract between the proposer and offeree.

(see also the case of *Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan Wan Majid & Anor (Interveners)* [1996] 3 CLJ 393; [1996] 3 MLJ 385).

[34] Bearing the above principles in mind and returning to the facts of the present case, evidently, from the defendants' email dated 23 December 2015, the defendants were willing to accept the plaintiff's offer on condition that payment shall commence in April 2016 which tantamount to a counteroffer. In the Federal Court case of *The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor* [1998] 2 CLJ 486 Mohamed Dzaiddin FCJ (as he then was), in delivering the judgment of the court had held as follows:

> According to *Chitty on Contracts*, 26th Edn. (1989) Vol. 1, para. 54, p. 44, "an acceptance is a final and unqualified expression of assent to the terms of the offer". But, where the reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter-offer which the original offeror can accept or reject (*ibid*. paras. 56, 95, pp. 46, 72). In the light of the conditions put forward by Sri Ram & Co. in P15 that the bank gave an undertaking to withdraw the two suits and that each party to pay their own costs, which terms were not in P11, it is our conclusion that P15 does not constitute a final acceptance of the bank's terms of the offer, but an attempt by the offeree to vary the original offer in P11 to include new terms on undertaking and costs. In the circumstances, there was no concluded contract.

[35] In the circumstances, it behoves the plaintiff to either accept or reject the defendants' counteroffer. There was, however, no acceptance and/or rejection communicated by the plaintiff to the defendants in the instant case. The Federal Court had in the case of *Affin Bank Bhd v. Mohd Kasim Ibrahim* [2013] 1 CLJ 465 held that acceptance can be inferred from the conduct of parties as follows:

> [124] Clearly both parties were aware of each other's terms but when the acceptance is conveyed in such a form as to make it apparent that what is accepted is not the offer as made, but what the acceptor wants it to be, by conduct (in accepting the respondent counter-offer) the appellant had impliedly accepted the respondent's counter-offer.

[125] As was also clearly illustrated in *Halsbury's Laws of England* 2nd edn at p. 137:

> ... Where one party intends to make a contract on one set of terms and the other intends to make a contract on another set of terms, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that the others has agreed to the terms of the others. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the person thus conducting himself is bound as if he had intended to agree to the other party's terms.

[126] Whilst it is undeniable that the appellant seemed unbending in its refusal to give in to the respondent's plea of his retirement at 60, the fact remains that the appellant, in not terminating the respondent's service with immediate effect, had by implication, accepted the respondent's counter-offer and it is not open for it to now deny its obligation. The appellant is therefore estopped by conduct.

[36] Upon careful scrutinisation of the email dated 22 December 2015, it is clearly stated that in the absence of any reply by the defendants, the plaintiff would have proceeded with the restructuring as proposed by them without further notice to the defendants.

[37] On the facts of this case, based on the correspondences between the PW2 and second defendant *via* WhatsApp, it is clear that failure on the part of defendants to make the excess payment, that PW2 shall proceed with the restructuring of the overdraft facility. It is absurd for the plaintiff to refuse the restructuring of the overdraft facility merely because the defendants had replied with a counteroffer. The plaintiff had in fact proceeded to uplift the fixed deposit totalling to RM751,065.92 to settle part of the overdraft facility in accordance with their proposal in the email dated 22 December 2015.

[38] Based on the above authority and upon careful scrutinisation of all evidence as adduced before this court, it is thus in my considered view, that there was an implied acceptance of the counteroffer on the part of the plaintiff. The sum procured from the liquidation of the fixed deposit should have been sufficient to cover the excess of the overdraft facility at the material time. The plaintiff is, therefore, duty-bound to uphold their promise to the defendant in restructuring the overdraft facility.

Legitimate Expectation

[39] Reference was made to the Court of Appeal case of *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538; [2008] 4 MLJ 309 where the court had considered the principles of legitimate expectation at length and held as follows:

A [29] It is apparent that the appellants agreed to move after hearing the promises advanced by the then Menteri Besar of Perlis. The cajoling succeeded. The Royal address too carried weight. With a carrot dangling in front of them, so to speak, the appellants were more than willing to be re-settled at Lubuk Sireh. They moved and re-settled at Lubuk Sireh. They were led up the garden path, so to speak. The notion of legitimate B expectation is an interesting area of the law. I would, with respect, endorse the approach of Lord Fraser in *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629, especially the part where His Lordship said that: **legitimate expectations in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis**. His Lordship the proceeded to identify three C practical questions underlying all legitimate expectations cases, namely:

(a) To what has the authority committed itself?

(b) Has the authority acted unlawfully in respect of its commitment?

(c) What should the court do about it?

D

[30] In the context of the present appeal, the first question is the easiest to answer. That the second respondent - the Kerajaan Negeri Perlis, had lawfully committed itself to providing the appellants with all those promises. The second question is certainly more difficult to answer because there is no magic formula for determining the legality of the E actions. The court, for instance, in *R v. Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 faced a difficult task in balancing competing interests, weighing the value of flexibility of resource allocation against the need to adhere to promises. However, consistency of treatment and equality were, according to the court, equally important and it should be secured when an authority tried to depart from an F established policy, whether or not there had actually been any detrimental reliance on the expectation. Here, in this appeal, the detriment was quite significant. To renege on the promises would certainly amount to an abuse of power. In regard to the third question, what would be the role of the court in such circumstances? What should this court do? There is only one answer. It is this. To compel the authority to keep to their G promises. I will now continue with the narration of the facts.

...

[52] *Whether an expectation exists, is clearly a question of fact. So, if a person did not expect anything then there is nothing that the doctrine of legitimate expectation can protect. Here, the appellants expected the respondents to keep to their promises* H *and so the appellants expect that the doctrine of legitimate expectation to protect them and the said doctrine can be invoked to protect them*. As I said, the statement of claim made reference to the doctrine of legitimate expectation and I must give effect to it in this judgment. But if a person is unaware of an undertaking made by a public authority, then he cannot expect compliance I with that undertaking (*Chundawara v. Immigration Appeal Tribunal* [1988] Imm AR 161, where an unincorporated but ratified treaty of which the

> claimant was unaware could not found legitimate expectation). A taxpayer, for instance, must rely upon a representation from the Revenue before his expectation will be protected (*R v. Inland Revenue Commissioners ex p Matrix-Securities Ltd* [1994] 1 WLR 334). But taxpayers seeking revenue clearance for their proposals must make full disclosure before the revenue's assurances will be binding (*R v. Inland Revenue Commissioners ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545). (emphasis added)

[40] Based on the above authority, it is clear that in order for the doctrine of legitimate expectation to give rise to a substantive right, an ambiguous representation must have induced the said legitimate expectation. Whether an expectation exists, is clearly a question of fact. So if a person did not expect anything, then there is nothing that the doctrine of legitimate expectation can protect.

[41] Bearing the above principles in mind and in view of my above-finding that there was a binding promise between parties, the plaintiff had clearly made a commitment to restructure the overdraft facility notwithstanding the defendants' reply to the plaintiff as evident from the email dated 22 December 2015, thereby enabling the defendants to invoke the doctrine of legitimate expectation. In this case, the defendants expected the plaintiff to keep to their promises for the restructuring of the overdraft facility, the duty thus falls on the plaintiff to fulfil what has been promised to the defendants ie, to restructure the first defendant's overdraft facility to be converted to a five years term loan as proposed in the email dated 22 December 2015.

***Turquand* Rule**

[42] The *Turquand* rule established in the case of *Royal British Bank v. Turquand* (1856) 119 ER 886; [1843-60] All ER Rep 435 protects third parties dealing with a company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed and that the third parties are not bound to inquire whether acts of internal management have been regular (see the case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465).

[43] In the context of the present case, it was never disputed that PW2 had the authority to deal with the plaintiff in matters relating to the restructuring of the overdraft facility. PW2 had however admitted during trial that the said matter was never brought to the attention of the approving body. PW2's failure cannot be attributed to the defendants and there was no obligation imposed on the defendants to inquire into PW2's work.

[44] In the circumstances, I am of the considered view that it was reasonable for the defendants to expect that PW2 had acted in compliance with the internal procedures of the plaintiff in ensuring that the restructuring of the first defendant's overdraft facility obtains the requisite approval. As

the Federal Court noted in *Pekan Nenas (supra)*, once the rule in *Turquand*'s case (*supra*) is held to apply, the presumption of regularity of the internal affairs of the company becomes an irrebuttable presumption. I bear repetition in stating that the plaintiff is liable towards the defendants to restructure the first defendant's overdraft facility to be converted to a five years term loan as proposed in the email dated 22 December 2015.

Defendants' Counterclaim

[45] The defendants had premised their counterclaim on the unlawful and illegal termination of the loan agreement between the plaintiff and the first defendant. It was the defendants' contention that the defendants did not violate any term of the loan agreement and the termination of the loan agreement by the plaintiff was thus premature and defective in nature.

[46] In view of my above-finding in respect of the restructuring of the overdraft facility, I agree with the defendants' contention that the termination of the loan agreement by the plaintiff was premature and therefore invalid.

[47] The burden of proof incumbent on a party claiming damages is to place before the court sufficient evidence of the loss it has suffered as result of the breach committed by the contract breaker. *McGregor on Damages* (Sweet & Maxwell, 18th edn 2009) provides succinctly for this requirement at paras. 8-001:

> A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v. Deveridge* and *Twyman v. Knowles*.

[48] The same view was expressed in the case of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360, Edgar Joseph Jr J (as he then was) said at p. 644 (CLJ); at p. 367 (MLJ):

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

He added a little later:

> On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v. Permanite* [1951] 1 KB 422 at p. 438, namely, '*where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless. it remains*

> *true to say that generally 'difficulty of proof does not dispense with the necessity of proof* (see *Aerial Advertising Co v. Batchelors Peas* [1938] 2 All ER 788 at p. 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v. Curtin* [1971] 1 WLR 1731 in which the plaintiff claiming for diminution of profits of his one-man business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given. (emphasis added)

[49] This is a matter of proof, and the evidential burden falls on the defendants to prove that the termination of agreement by the plaintiff had caused damages to the defendants. It is for the defendants to bring evidence into court to support its claim and for the plaintiff to dispute such a claim.

[50] The defendants in claiming for the aggravated damages for the total sum of RM100,000 had tendered a list of request for proposal ("RFQ") that the first defendant was unable to participate due to the plaintiff's action in suing them.

[51] In order for the defendants to be able to claim for damages, the defendants must prove the damage and it is not enough to merely write down the particulars and rely on the same. In the Federal Court case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15, it was held as follows:

> Before we embark upon a detailed consideration of the specific issues which arise for decision, there are three preliminary matter which, at the outset, require emphasis. Firstly, that part of the judgment of the judge which provides that the Vendor shall pay to the purchaser damages to be assessed for wrongful termination of the Agreement with costs and that Tan Sri Khoo and the Vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* 64, TLR 177, 178:
>
> > ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the Court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

A This *dictum* was referred to and applied by our Court of Appeal in *John v. Dharmaratnam* [1962] MLJ 187.

[52] In *Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor* [2012] 5 CLJ 229, the court held as follows:

B > It is trite law that the task of accounts and assessment of damages is an exercise of judicial discretion. Such discretion is on a judicial one, as it is not exercised based on whims and fancies, but be reference, guidance and application of established judicial principles and of course having regard to all the facts and evidence adduced before the officer or the judge who undertakes the assessment.

C **[53]** In view of the above authority and having critically analysed all evidence as adduced before this court, it is thus in my considered view that the RFQ as listed was merely requests for quotation and does not amount to sufficient proof of damages as against the plaintiff. It is, therefore, my conclusive finding that the defendants had failed to prove its claim for D damages against the plaintiff.

Conclusion

[54] In coming to a decision, this court has carefully weighed both the oral and documentary evidence adduced by all parties, scrutinised all the E documents tendered and relied upon by the parties and considered the written submissions as well as the authorities filed by them. In considering the evidence as a whole especially the evidence of all the plaintiff's witnesses *vis-a-vis* the pleadings, and that of the defendants, it is my considered view that the plaintiff had failed to prove its pleaded case on a balance of F probabilities against the defendants.

[55] For the reasons adumbrated above and in considering the totality of evidence before me, I hereby dismiss the plaintiff's claim and order as follows:

(i) The plaintiff to proceed with the restructuring of the overdraft facility G in accordance with the term as proposed in the email dated 22 December 2015; and

(ii) parties are to bear their owned costs of this action.

[56] On the counterclaim by the defendants, with the findings of this court H as above, I hereby dismissed the defendants' counterclaim.

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